IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-4181

EXPEDITIONS UNLIMITED AQUATIC ENTERPRISES, INC.

and

NORMAN SCOTT,

Petitioners,

vs.

SMITHSONIAN INSTITUTION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

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Petitioners Expeditions Unlimited Aquatic Enterprises, Inc., and Norman Scott, pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 28, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto (Appendix A) as does the opinion rendered by the United States District Court for the District of Columbia (Appendix B). This action had previously been before the Court of Appeals on a procedural matter. *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute* (sic), 163 U.S. App. D.C. 140, 500 F.2d 808 (1974).

JURISDICTION

The District Court had jurisdiction under D.C. Code §11-521, 1967 ed. (amount in controversy exceeds $50,000.00, prior to Court Reorganization Act of 1970) and 28 U.S.C. §1332. The judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 28, 1976, and this petition for writ of certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Does the Federal Tort Claims Act, 28 U.S.C. §1346(b) and 2671, *et seq.*, confer sovereign immunity upon an entity previously suable in tort and if not, has the Smithsonian Institution elsewhere been conferred by Congress with immunity from suit?

STATUTES INVOLVED

20 U.S.C. §41. Incorporation of Institution.

The President, the Vice-President, the Chief Justice, and the heads of executive departments are hereby constituted

an establishment by the name of the Smithsonian Institution for the increase and diffusion of knowledge among men, and by that name shall be known and have perpetual succession with the powers, limitations, and restrictions hereinafter contained, and no other.

28 U.S.C. §1346. United States as Defendant.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims:

. . . .

(b) Subject to the provisions of Chapter 171 of this title [§§2671-2680 of this title], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2671. Definitions.

As used in this chapter [§§2671-2680 of this title] and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty. (June 25, 1948, c. 646, §1, 62 Stat. 982; May 24, 1969, c. 139, §124, 63 Stat. 106; July 18, 1966, P.L. 89-506, §8, 80 Stat. 307.)

28 U.S.C. §2679. Exclusiveness of remedy.

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive. . . .

28 U.S.C. §2680. Exceptions.

The provisions of this chapter and section 1346(b) of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute, or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, §13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives. (June 25, 1948, c. 646, 62 Stat. 984; July 16, 1949, c. 340, 63 Stat. 444; Sept. 26, 1950, c. 1049, §§2(a)(2), 13(5), 64 Stat. 1038, 1043; August 18, 1959, P.L. 86-168, Title II, §202(b), 73 Stat. 389.)

STATEMENT OF THE CASE

On March 6, 1970, Alicia Dussan de Reichel, a Professor in Bogota, Colombia, sent a handwritten personal letter to Betty Meggers, wife of Defendant Clifford Evans, Chairman of the Department of Anthropology of the National Museum of Natural History of the Smithsonian Institution, indicating that Plaintiffs Expeditions Unlimited Aquatic Enterprises, Inc., and Norman Scott, were being enthusiastically considered by the Institute Colombiano de Anthropologia to engage in underwater archeological explorations in Colombia. The letter further indicated Professor Dussan's personal dislike for this proposition and requested a return letter, not referring to her request, from Defendant Evans and Dr. Meggers in support of her position. Apparently without researching the matter, Dr. Evans immediately responded as requested, on Smithsonian stationary, signing as "Chairman, Department of Anthropology, National Museum of Natural History." The letter dated March 11, 1970, and addressed to Professor Dussan, states as follows:

> ". . . I made an individual inquiry and I am bringing this matter to your immediate attention so that Colombia and especially the Institute does not get involved in an unscientific venture.
>
> This organization (Expeditions) is without scientific competence in the field of archeology. They are purely treasure hunters that have no scientific

> staff trained in archeology and they have been in several unfavorable situations in Florida that have caused the name of the company to be changed several times to avoid litigation. They have no valid reason to conduct this expedition in Colombia and it would be a scientific disgrace if the Institute gave permission to an unscientific organization of this nature for it would cause international problems and affect the image of the Institute and damage its reputation which now is so high. Since you are in a position now as Director of the Museums, I feel I should write you at once so that you could take whatever action possible with any of your supervisors, government officials, and embassy people to prevent this disgraceful expedition that is going on under the guise of science.
>
> I am sending a carbon of this letter to my good friend, Mr. Andy Wilkison, Cultural Affairs Officer, U.S. Embassy, Bogota, Colombia, and alert him on the severity of this problem. He is an old friend of ours, international science, and the Smithsonian Institution and will do everything to see that the good international relationships continue between Colombia and the U.S. Please call him and see what he can do at international level to prevent this organization from operating in Colombia, if it cannot be stopped otherwise."

On January 8, 1971, petitioners, Expeditions Unlimited Aquatic Enterprises, Inc., and Norman Scott, filed this libel action against Clifford Evans based upon the libelous portions of the above letter and against the Smithsonian Institution and its Regents based upon their knowledge, consent and ratification of Evans' actions. The Smithsonian

has not denied the scope of Evans' employment or its ratification of his actions. No claim arising out of the Federal Tort Claims Act, 28 U.S.C. §1346(b), 2671, *et seq.*, was advanced.

On January 17, 1972, the District court granted summary judgment in favor of all defendants, holding that the "Smithsonian Institution is an establishment of the United States and a Federal Agency within the meaning of the Federal Tort Claims Act, 28 U.S.C. §2671 *et seq.*, which by §2680 was expressly excepted from being sued for libel. . . ." On December 19, 1972, plaintiffs' motion to vacate the entry of judgment on the grounds of lack of notice was denied. The Court of Appeals reversed on June 26, 1974. On July 31, 1974, the order of summary judgment was vacated and re-entered.

Appeal from the entry of summary judgment was taken and on June 28, 1976, the United States Court of Appeals for the District of Columbia Circuit reversed in part and affirmed in part, holding, *inter alia*, that the Smithsonian Institution was granted sovereign immunity by 28 U.S.C. §2680(h).

REASONS FOR GRANTING THE WRIT

I. TO RESOLVE CONFLICT BETWEEN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND OTHER FEDERAL CIRCUITS AND LOWER FEDERAL COURTS

The decision of the United States Court of Appeals for the District of Columbia Circuit should be reviewed because it is in direct conflict with appellate decisions in several other circuits and with District Court decisions in further circuits. *Baker v. F&F Investment Co.*, 489 F.2d 829 (7th

Cir. 1973); *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140 (5th Cir. 1971); *Brewer v. Sheco Construction Co.*, 327 F. Supp. 1017 (W.D. Ky. 1971); *Latch v. Tennessee Valley Authority*, 312 F. Supp. 1069 (N.D. Miss. 1970); *De Scala v. Panama Canal Co.*, 222 F. Supp. 931 (S.D.N.Y. 1963).

In the instant action, the Court of Appeals rejected the argument that the Federal Tort Claims Act, 28 U.S.C. §§1346(b) and 2671, *et seq.* (hereinafter "F.T.C.A."), operated only as a select waiver of pre-existing sovereign immunity, and held that the Act in fact conferred immunity upon certain entities, including the Smithsonian Institution. Specifically, the Court of Appeals held that 28 U.S.C. §2680(h), which expressly excepted libel actions from the scope of the F.T.C.A. in fact conferred immunity in libel actions where none had existed before.

In *Baker v. F&F Investment Co.*, 489 F.2d 829, 834-836 (7th Cir. 1973), the Seventh Circuit upheld the District Court's refusal to dismiss a tort action against several federal agencies, holding that in suits within the purview of the exceptions listed by 28 U.S.C. §2680, the F.T.C.A. does not apply, and the immunity issue must be resolved by pre-F.T.C.A. common law immunity scrutiny. The Court emphasized that the United States, itself, could not be sued because the exception to the waiver of immunity of the F.T.C.A. continued the United States' pre-existing immunity, but that with respect to named agencies, pre-F.T.C.A. suability status was unaffected by the F.T.C.A. for actions enumerated in §2680.

A similar result was reached in the Fifth Circuit. In *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140 (5th Cir. 1971), the Fifth Circuit held that a plaintiff may bring an action against the United States under

the Suits in Admiralty Act, based upon negligent misrepresentation, even though negligent misrepresentation is excepted from the F.T.C.A. by §2680(h). The decision recognizes that the F.T.C.A. did not confer immunity even on the United States, itself, in situations where it was previously suable, and that for actions cognizable under §2680(h), Courts must look elsewhere to determine the question of suability.

Several District Courts have reached the same conclusion concerning other portions of §2680. In *Brewer v. Sheco Construction Co.*, 327 F. Supp. 1017 (W.D. Ky. 1971), the District Court held that the F.T.C.A. did not apply to suits against the Tennessee Valley Authority, per the parallel exception clause, 28 U.S.C. §2680(*l*), and that the susceptibility of the T.V.A. to suit would revert to pre-F.T.C.A. law. The decision of the Court of Appeals in the instant case is in conflict with *Brewer* in that *Brewer* deems certain exceptions to the F.T.C.A. to preserve the status quo, while the instant case holds that others, derived from the same section, actively confer immunity.

In *Latch v. Tennessee Valley Authority*, 312 F. Supp. 1069 (N.D. Miss. 1970), the District Court held that, while an action enumerated under §2680(*l*) cannot be brought under §1346(b) of the F.T.C.A., it may be brought under other jurisdictional statutes. The Court further held that the F.T.C.A. waiver of immunity left untouched the defendant's pre-existing suability.

In *De Scala v. Panama Canal Co.*, 222 F. Supp. 931, 934 (S.D.N.Y. 1963), the District Court held that §2680 (m) neither conferred nor intended to confer immunity on the Panama Canal Company, but, in fact, continued its pre-existing suability. *See also, Gardner v. Panama Railroad Co.*, 342 U.S. 29 (1951) (dictum).

The Court of Appeals' decision in the instant case finds support in several cases, although none except the instant case directly confronts the language of §2680 that "The provisions of this chapter and section 1346(b) of this title *shall not apply* to . . ." (emphasis added). (*See* Slip Op. at 9). The issue of whether the F.T.C.A. in fact conferred immunity upon entities such as the Smithsonian therefore presently rests squarely in a state of limbo, the result dependent solely upon which circuit hears the action.

II. TO DECIDE AN IMPORTANT FEDERAL QUESTION

The question of whether the F.T.C.A. confers immunity upon any agency or establishment or merely waives portions of pre-existing immunity is an important federal question which has not heretofore been decided by this Court.

Congress' purpose in enacting the F.T.C.A. was twofold. First, in order to avoid injustice to those having meritorious claims against the sovereign and to eliminate the burden in Congress of investigating and passing private bills seeking individual relief, the F.T.C.A. waived some of the immunity which had existed previously as to certain types of actions. *United States v. Muniz*, 374 U.S. 150, 154 (1963); *Feres v. United States*, 340 U.S. 135, 141 (1950); *Baker v. F&F Investment Co.*, 489 F.2d 829, 835 (7th Cir. 1973). Second, it provided that the United States would answer in its own name for those acts covered by the waiver even though the acts were performed by employees of a federal agency. 28 U.S.C. §2674; *Feres v. United States*, 340 U.S. 135, 141 (1950); *Brewer v. Sheco Construction Co.*, 327 F. Supp. 1017 (W.D. Ky. 1971).

The Court of Appeals in this action engrafts a new purpose of the F.T.C.A. – to actively create immunity for

previously suable entities. This alleged purpose is completely contrary to the prior recognized intent of the F.T.C.A. of waiver of immunity. This shift in policy can do nothing but throw the body of law arising under the F.T.C.A. into a state of disarray.

The effect of the Court of Appeals' unique view of the purpose of the F.T.C.A. when coupled with the peculiar character of the Smithsonian Institution raises further doubt as to whether the Smithsonian should enjoy absolute immunity from suit. The Court of Appeals recognizes that "the Smithsonian has a substantial private dimension. . . ." (Slip op. at 3). In fact, the Smithsonian Institution began with a completely private bequest of James Smithson in 1829. *General Hearings Before the Subcommittee on Library and Memorials,* 91st Cong., 2d Sess., 16 (1970). Congress determined in 1846 that the Federal government did not have the authority to administer the trust directly, and the bequest was lent to the United States Treasury, earning 6 per cent interest in perpetuity. *Id.* Its origin indicates that the Smithsonian was not so intricately involved with the sovereign itself as to share in the United States' blanket of immunity. The actual operation of the Smithsonian during its first century lead this Court to comment in 1939 as follows:

> "It is noteworthy that the oldest surviving government corporation – The Smithsonian Institution – has several times been in the law courts, even in the absence of explicit authority and although the general feeling regarding governmental immunity was very different in 1846 from what it has become in our own day. 9 Stat. 102, *Smithsonian Institution v. Meech,* 169 U.S. 398; *Smithsonian Institution v. St. John,* 214 U.S. 19.

Keifer & Keifer v. Reconstruction Finance Corporation, 306 U.S. 381, 391-92 (1939).

Since its overwhelmingly private origin, the Smithsonian has oranched into many fields previously occupied by the private sector. *See General Hearings Before the Subcommittee on Library and Memorials, supra.* In discussing the issue of immunity of Defendant Evans, the Court of Appeals noted that:

> "In this era of government grown far beyond any limits envisioned even at the beginning of this century, the Supreme Court's functional approach to immunity doctrine makes it entirely appropriate to recognize that many of the areas government has entered involve operations nearly undistinguishable from private endeavors, having only the most marginal effect on matters usually identified with the public sector." (Slip op. at 29).

In light of this recognition that government in general, and the Smithsonian, specifically, has grown to encompass fields of endeavor not traditionally associated with those crucial activities which must be protected at all costs by an impenetrable blanket of immunity, rigid application of immunity and the view that Congress intended by the F.T.C.A. to confer full immunity on entities not previously within its shield are contrary to settled and basic concepts of law. *See R.F.C. v. Menihan Corp.,* 312 U.S. 81, 84 (1941); *F.H.A. v. Burr,* 309 U.S. 242, 245 (1940); *Keifer & Keifer v. R.F.C.,* 306 U.S. 381, 388-389 (1939).

It should also be noted that the Smithsonian continues to the present day to protect its status as a private institution. On the same day this action was filed, another

action was filed by Plaintiff's predecessor corporation against the Smithsonian Institution in the United States District Court for the District of Columbia. (Civil Action No. 55-71). The dispute concerned a contract between the parties for archeological work on the U.S.S. Tecumseh. Therein the Smithsonian actively protected its capacity as a private institution. Had that action, which was substantially in excess of $10,000.00, been deemed one against the United States, the District Court would have had no jurisdiction. 28 U.S.C. §1346(a)(2). The action could only have been brought in the Court of Claims. 28 U.S.C. §1491. In addition, a jury trial is not permitted in an action against the United States under 28 U.S.C. §1346(a)(2). 28 U.S.C. §2402. However, the Smithsonian raised neither of these substantial points and the case was tried before a jury in the United States District Court. It appears therefore that the Smithsonian is attempting to adopt a chameleon-skin cloak under which it may alter its character in order to assume a new status whenever it may appear beneficial.

The suability status of inherently private entities and the effect of the F.T.C.A. therefore present an important question of federal law which should be determined by this Court.

III. DECISION IGNORES PLAIN LANGUAGE OF ACT AND IS CONTRARY TO ITS EXPRESS PURPOSE

The plain language of 28 U.S.C. §2680(h) states that:

> The provisions of this Chapter (Chapter 171, 28 U.S.C. §2671 et seq.) and Section 1346(h) of this title shall not apply to . . .
>
> (h) any claim arising out of libel.

Congress could not have made it clearer that the F.T.C.A. in its entirety does not apply in actions for libel. While the Court of Appeals recognizes the meaning of Section 2680(h), it defers to several prior opinions, commenting, "the courts' consistent sense of legislative intention is impressive even though the decisions fail to acknowledge the difficulty presented by the literal text." (Slip op. at 9). The Court further admits being influenced by the fact that perplexing questions as to the state of the common law would result from a literal reading of the F.T.C.A., with few, if any, differences in result. (Slip op. at 10). Because of the inherently private nature of the Smithsonian, the instant case is one in which the result would differ. Difficulty in application of the F.T.C.A. is an invalid reason to reject its plain and express language.

Had Congress intended to confer immunity by the F.T.C.A., it could have done so merely by stating that there shall be immunity for the exceptions listed in Section 2680. Its failure to do so strongly indicates its intent to continue the suability status which existed prior to the F.T.C.A. for entities sued upon claims listed in Section 2680.

In order to determine the suability of such an entity, it is, thus, necessary to consult relevant caselaw. A review of the law on immunity makes it abundantly clear that the Smithsonian Institution is not "so vital to some overriding public interest that it must be immunized from the possibility of civil accountability." *Lasher v. Shafer*, 460 F.2d 343, 348 (3d Cir. 1972). *See R.F.C. v. Menihan Corp.*, 312 U.S. 81, 84 (1941); *United States v. Shaw*, 309 U.S. 485, 501 (1940); *F.H.A. v. Burr*, 309 U.S. 242, 245 (1940); *Keifer & Keifer v. R.F.C.*, 306 U.S. 381, 388-89 (1939); *Sloan Shipyards v. United States Fleet Corp.*, 258 U.S. 549, 566-67 (1922).

As this action enjoys a jurisdictional basis independent of 28 U.S.C. §1346(b), and the F.T.C.A. expressly does not apply to actions for libel, the Smithsonian cannot use the F.T.C.A. as a basis for a defense of immunity.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1899

EXPEDITIONS UNLIMITED AQUATIC ENTERPRISES, INC., A CORPORATION, APPELLANT
NORMAN SCOTT

v.

SMITHSONIAN INSTITUTION, ET AL

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action 54-71)

Argued 18 September 1975

Decided 28 June 1976

***John J. Pyne*, for appellant.**

***Jeffrey T. Demerath*, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney and *John A. Terry* and *Suzanne D. Murphy*, Assistant United States Attorneys, were on the brief for appellee.**

Before: LEVENTHAL and WILKEY, *Circuit Judges* and SOLOMON,* *United States Senior District Judge* for the District of Oregon

Opinion for the Court filed by *Circuit Judge* WILKEY.

Opinion concurring and dissenting in part filed by *Circuit Judge* LEVENTHAL.

WILKEY, *Circuit Judge*: This case comes before us on appeal from an order of summary judgment entered 31 July 1974,[1] in an action for libel brought by petitioners against the Smithsonian Institution and its Regents, and against Clifford Evans, Chairman of the Department of Anthropology at the Museum of Natural History. The claim arose out of a letter written by Evans, in which he expressed views as to the capabilities of petitioner Expeditions Unlimited in the field of underwater archaeological excavation. The merits of the libel claim are not presently before us, since summary judgment for defendants was granted on the grounds of Smithsonian's governmental immunity and Evans' absolute privilege in making statements within the scope of his duties as a government employee.

I. IMMUNITY OF THE SMITHSONIAN INSTITUTION

The holding of the district court that the Smithsonian Institution may not be sued for libel is affirmed. That conclusion rests upon our reading of the Federal Tort Claims Act. Because we find that the Tort Claims Act should be read as granting federal agencies immunity from suit for libel, we do not reach the issue of the Institution's immunity status at common law.

In finding immunity under the Act, the initial step is to determine whether the defendant organization is a

* Sitting by designation pursuant to 28 U.S.C. § 294(d)

[1] App. at 6-8

"federal agency" within the definition set forth in the statute.[2] Although the Smithsonian has a substantial private dimension,[3] we conclude that the nature of its function as a national museum and center of scholarship, coupled with the substantial governmental role in funding[4] and oversight,[5] make the institution an "independent establishment of the United States," within the "federal agency" definition.[6]

[2] 28 U.S.C. § 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

* * * * *

[3] The Smithsonian has private endowment funds which in 1970 totalled $33 million. *General Hearings Before the Sub-Committee on Library and Memorials*, 91st Cong., 2d Sess., 323 (1970). (hereinafter *Hearings*). In that year over $15 million of private money went toward operations of the Institution, and almost one-third of the employees were non-federal. *Id.* at 253.

[4] Approximately 75% of the Institution's operating funds come from federal appropriations. *Hearings, supra* note 3, at 253, 321.

[5] Eight of the seventeen Regents of the Institutional acquire their positions by virtue of holding other high positions in the federal government. 20 U.S.C. § 42 (1970). The remaining Regents are appointed by joint resolution of Congress. 20 U.S.C. § 43 (1970). The Institution is audited periodically by the General Accounting Office. *See Hearings, supra* note 3, at 362-97.

[6] 28 U.S.C. § 2671 (1970). While there is no outstanding stock of the Smithsonian, it has more in common with the "mixed ownership government corporations," 31 U.S.C. § 856 (1970), like the F.D.I.C., which have been found to be "fed-

Section 1346(b) of Title 28, U.S.C., creates, subject to the provisions of 28 U.S.C. §§ 2671-80, a remedy against the United States for injuries wrongfully caused by any "employee of the government." [7] Because the Smithsonian is a federal agency. its employees are employees of the government," and the § 1346(b) action thus may lie.[8] Under 28 U.S.C. § 2679(a), the § 1346(b) remedy is made exclusive in cases where that section applies, even where an agency may elsewhere be authorized to sue and be sued in its own right.[9] However, under 28 U.S.C. § 2680(h), the provisions of the Tort Claims Act, including the jurisdictional provision, § 1346(b), are made inapplicable to libel actions, such as the one presently before us.[10] The difficult interpretive prob-

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eral agencies," *Davis v. F.D.I.C.*, 369 F.Supp. 277, 279 (D. Colo. 1974); *Freeling v. F.D.I.C.*, 221 F.Supp. 955, 955-56, (W.D. Okla. 1962), than with corporations whose only significant governmental contact is a federal charter. *Pearl v. United States*, 230 F.2d 243, 245 (10th Cir. 1956) (Civil Air Patrol held not a federal agency). The substantial federal funding and the important supervisory role played by governmental officials are the most important factors linking it to the government. *Cf. United States v. Orleans*, 44 U.S.L.W. 4700 (1 June 1976); *Logue v. United States*, 412 U.S. 521 (1973).

[7] 28 U.S.C. § 1346(b) (1970).

[8] 28 U.S.C. § 2671 (1970).

[9] 28 U.S.C. § 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

[10] 28 U.S.C. § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

* * * *

[Continued]

lem posed by this case is to determine the effect of this exceptions clause.

On the one hand, the exceptions clause might be viewed as making the Tort Claims Act entirely inapplicable to libel actions, in which event the common law immunity status of a defendant would govern, and an action might be possible if independent jurisdictional grounds could be found. On the other hand, § 2680(h) could be seen as imposing a bar to suit, if the Tort Claims Act is regarded as a systematic statute governing all tort claims, with the exceptions clauses setting forth the areas where suit is to be barred.

There are significant arguments to be made in favor of the first view. The language of the exceptions section makes no reference to any creation or, more properly, continuation of long established governmental immunity in the categories of cases it sets forth. Rather, the exceptions section only states that the provisions of the Tort Claims Act "shall not apply." [11] It would not be illogical to conclude that, in these categories of cases, the Act neither creates nor removes immunity but leaves the question of suability as it was before the Act, to be determined by other statutes and by common law rules. This interpretation is further bolstered by the construc-

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[10] [Continued]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentations, deceit, or interference with contract rights.

[11] There is not only the language of § 2680, the exceptions section, but its interrelation with § 1346(b), the jurisdictional section. The section entitled "Exceptions" begins: "The provisions of . . . section 1346(b) of this title shall not apply to . . . (h) Any claim arising out of . . . libel, slander . . . ." If the section conferring jurisdiction simply does "not apply," can the Tort Claims Act have any relationship to an action for libel? We conclude that it does, but the answer appears by no means as simple as has been assumed.

tior which has been given to § 2680(1) and (m), which except the Tennessee Valley Authority and the Panama Canal Company from the Act's provisions. These parallel provisions to the libel exception (h) have consistently been held not to create any immunity, but to allow suit to be brought against the organizations just as before the Act, under separate statutory authorizations.[12]

While logic and a consistent reading of the statute would, by themselves, thus lead us outside the Act at the very start, to inquire as to the Smithsonian's common law immunity status and as to other possible bases of jurisdiction, other factors cause us to reject this approach. Legislative history, the great weight of judicial precedent, and a desire to facilitate future application of the Act, convince us that § 2680(h) should be read as an affirmative grant of immunity to "federal agencies" in the types of deliberate tort cases which it describes.

We conclude from the structure of the Tort Claims Act, and from the legislative reports accompanying its passage, that Congress probably did not intend to leave unaffected by the Act the categories of suits excepted by § 2680(h). While primarily seeking to expand governmental liability for torts, it appears to us that Congress also sought to systematize and centralize the immunity laws.[13] One evidence of this appears in § 2679(a) of the

[12] *Gardner v. Panama R.R.*, 342 U.S. 29, 31 (1951) (dictum); *Brewer v. Sheco Construction Co.*, 327 F.Supp. 1017, 1018-19 (W.D. Ky. 1971); *Latch v. T.V.A.*, 312 F.Supp. 1069, 1071-72 (N.D. Miss. 1970); *De Scala v. Panama Canal Co.*, 222 F.Supp. 931, 934 (S.D.N.Y. 1963). The Congressional reports accompanying the Act explicitly indicate that some of the exceptions were included because "adequate remedies were already available." H.R. Rep. No. 1287, 79th Cong., 1st Sess., 6 (1945); S.Rep. No. 1400, 79th Cong., 2d Sess., 33 (1946).

[13] *See Wickman v. Inland Waterways Corp.*, 78 F.Supp. 284, 286 (D. Minn. 1948).

statute, which in essence renders ineffective any other laws allowing suit or creating remedies against an agency, where the actions "are cognizable under section 1346(b)."[14] Another evidence of this centralizing impulse appears in the context of exceptions clause § 2680(a).[15] This section sets forth the category of discretionary activity, for which immunity has traditionally been granted. That Congress bothered to include it in the exceptions section is consistent with the view that it meant to embody, within § 2680 all of the instances in which immunity is to exist under the statute. It seems to us an unreasonable conclusion, at least in the instances of exceptions (a) and (h), that Congress intended for courts to go beyond the Act, and inquire into common law immunity status and alternative jurisdictional grounds.

[14] 28 U.S.C. § 2679(a) (1970). The exception clauses dealing with the T.V.A. and the Panama Canal Company, 28 U.S.C. § 2680 (l) and (m) (1970), were clearly not intended to bar suit under separate authorizing statutes, *see* note 12 *supra*, and thus these clauses weaken somewhat the argument that the Act was intended to centralize all laws concerning federal governmental immunity. However, the uniqueness of these organizations, coupled with the fact that their amenability to suit was well established at the time the exceptions were adopted, lead us to conclude that we are not bound by rigid parallelism to clauses (l) and (m) in our construction of clause (h).

[15] 28 U.S.C. § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

More affirmative, though still ambiguous, evidence that Congress saw itself as pre-empting the common law of immunity appears in the reports which accompanied the bill through the House and Senate. In discussing the exclusivity provision,[16] the reports of both chambers make the following statement:[17]

> *This will place torts of "suable" agencies of the United States upon precisely the same footing as torts of "nonsuable" agencies.* In both cases, the suits would be against the United States, subject to the limitations and safeguards of the bill; and in both cases the *exceptions of the bill would apply either by way of preventing recovery at all or by way of leaving recovery to some other act*, as, for example, the suits in Admiralty Act. It is intended that *neither corporate status nor "sue and be sued" clauses shall, alone, be the basis for suits* for money recovery sounding in tort.

From these statements may be inferred a general intent to treat all federal agencies alike as regards immunity, irrespective of what their immunity status was at common law.[18] We find it likely that Congress conceived of

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[16] Now 28 U.S.C. § 2679(a) (1970).

[17] H.R. Rep. No. 1287, 79th Cong., 1st Sess., 6 (1945); S. Rep. No. 1400, 79th Cong., 2d Sess., 33-34 (1946) (emphasis added).

[18] However, this inference is not compelled by the actual language of the reports. The reports' statement, that suability clauses in agency charters do not affect the applicability of the Tort Claims Act, would not be in conflict with a view that common law immunity doctrine governs in cases thrown outside the Act by the language of the exceptions clause. Nor would the statement that corporate status alone is not a basis for suit, be in conflict with a conclusion that the Smithsonian may have no operative immunity arising from common law, in light of its corporate status *and* its unique mix of private and governmental operations, funding, and management. The language about the exception clauses either preventing recovery or leaving recovery to another Act also presents no inconsistency, since even if a court were to find operative common law immunity, a jurisdictional statute ("some other act") apart from the Act's § 1346(b) would have to be found for any suit to be entertained, at least in federal court.

itself as codifying the immunity law, and eliminating any necessity to look at the common law, once it is concluded that the defendant is a federal agency within the definition of the Act.

We might perhaps take a different view of legislative intent if this were a matter of first impression. But we give weight to the fact that since the time of enactment, it has been the consistent practice of the federal courts to read both exceptions (a) and (h) as defining grants of immunity to "federal agencies."[19] The courts' consistent sense of legislative intention is impressive even though the decisions fail to acknowledge the difficulty presented by the literal text.[20]

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[19] *Goddard v. District of Columbia Redevelopment Land Agency*, 287 F.2d 343, 345 (D.C. Cir.), *cert. denied*, 366 U.S. 910 (1961); *United States v. Delta Indus. Inc.*, 275 F.Supp. 934, 936-37 (N.D. Ohio 1966); *James v. F.D.I.C.*, 231 F.Supp. 475, 477 (W.D. La. 1964); *Freeling v. F.D.I.C.*, 221 F.Supp. 955, 956-57 (W.D. Okla. 1962).

[20] In *Goddard v. District of Columbia Redevelopment Land Agency*, 287 F.2d 343, 346 (D.C. Cir. 1961) the court asserts that libel claims "are cognizable under section 1346(b)" within the meaning of the exclusiveness of remedy provision, § 2679(a), even though the exceptions clause of § 2680(h) flatly states that the provisions of § 1346(b) "shall not apply to" libel. *Cf. Scanwell Laboratories, Inc. v. Thomas*, 521 F.2d 941, 946 (D.C. Cir. 1975), where the court observed, "If the claim falls outside the Act completely or within one of the exceptions-to-liability embodied in the statute, . . ." without finding it necessary to explain how the claim for negligent misrepresentation might "fall outside the Act completely."

We are also influenced, we must confess, by the consideration that a contrary reading of the statute would lead to perflexing questions as to the state of the common law, while not leading to a clear change of result in any imaginable case. For there to be any difference in result, the defendant would have to be within the "federal agency" definition of § 2674, and yet be sufficiently private as to lead to the inference that Congress, in creating the organization, intended not to render it immune.[21] Were both of these conditions met, it would be necessary, further, that the subject matter of the suit be within one of the clauses of § 2680 which are presently construed to confer immunity.

We cannot envisage that more than a few, if any, cases would meet all of these requirements, and thus be decided differently under a literal reading of the Act. Yet to determine whether it might be applicable would require the courts in a considerable array of cases to make a complex and speculative inquiry into common law immunity status.[22] We think the legislature intended the courts to decide suability questions by direct reference to the statute rather than by pursuit of the will-o'-the-wisp of the prior law. We conclude that exception clause (h) should continue to be read as defining the

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[21] For discussions of how immunity status would be determined at common law, see *R.F.C. v. Menihan Corp.*, 312 U.S. 81, 84 (1941); *F.H.A. v. Burr*, 309 U.S. 242, 245 (1940); *Keifer & Keifer v. R.F.C.*, 306 U.S. 381, 389 (1939).

[22] Case law indicates that the inquiry as to common law immunity must focus on whether Congress intended to confer immunity at the time the organization was created. *See* cases cited, note 21 *supra*. Yet it appears unlikely that any directly expressed Congressional intent could ever be found in the instance of a federal agency created after the passage of the Tort Claims Act, since Congress almost certainly gave no consideration to the immunity issue, but deferred instead to the framework of the Act.

existence of immunity in suits involving deliberate torts, and that the summary judgment in favor of Smithsonian should be affirmed.

II. Personal Immunity of Defendant Evans

A separate and distinct issue is raised on appeal, by the district court's conclusion that defendant Evans is personally immune from suit under an absolute privilege of federal officials to make statements within the outer perimeter of their duties.[23] We conclude that this question involves considerations not touched upon in Judge Waddy's brief order of summary judgment, and therefore we reverse and remand for further deliberations by the district court. As a guide in those deliberations we offer the following overview of personal governmental immunity doctrine, which is an attempt to integrate the now numerous Supreme Court decisions applying the doctrine in various contexts.

Most basically, the personal immunity question which we remand to the district court requires what ultimately may be a two-step inquiry. First, the court must determine whether Petitioner's statements qualify for the absolute immunity which clearly does apply to at least some actions of some executive officials. Second, should it find the absolute immunity inapplicable, the court must decide whether the statements are nonetheless protected under a variable qualified immunity, which is generally available to officials of the executive branch of government.[24]

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[23] *See* Order of Summary Judgment, 31 July 1974, *App.* at 6-8.

[24] . . . [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the

A. *Absolute or Qualified Immunity*

1. *The Choice—A Balance of Governmental and Private Interests*

In order to resolve the threshold question of absolute immunity, we must first decide how the choice between qualified and absolute immunity is to be made. In the area of personal immunity for members of the executive branch, quite unlike the matter of sovereign immunity for the government itself, there is no time-honored common law legacy to guide us.[25] Rather, the choice between

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existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974).

[25] While the Supreme Court in the nineteenth century more than once dealt with the problem of official immunity for executive officials, *see Apton v. Wilson*, 506 F.2d 83, 90-91 (D.C. Cir. 1974), no clear doctrine of general applicability was established. The seminal case in recent times is *Barr v. Matteo*, 360 U.S. 564 (1959), where the Supreme Court for the first time found absolute immunity in an official of subcabinet rank. In his dissent in that case, Mr. Justice Brennan noted that the Court was writing on "almost a clean slate." *Id.* at 586. *See also* Warren, C. J., *dissenting*. *Id.* According to Prosser, the doctrine of absolute privilege for certain executive officials originated in 1895. W. PROSSER, THE LAW OF TORTS 782 (4th ed. 1971).

With respect to common law background, it is also important to distinguish the immunity of executive officials from that of members of the legislative and judicial branches. For while absolute immunity for any members of the executive is a fairly recent development, it is a principle of several hundred years standing that both legislators and judges are absolutely immune from suit for acts committed in the course of their duties. *See Tenney v. Brandhove*, 341 U.S. 367, 372-76 (1951); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347-49 (1872).

absolute and qualified personal immunity must be made on the basis of a relatively few, fairly recent judicial opinions, most of them by the Supreme Court.[26]

As a matter of speculation, the line between absolute and qualified immunity for executive officials could conceivably be drawn in any number of ways. It might be defined quite mechanically, to immunize absolutely any action by anyone employed by the executive branch. Or, at the other extreme, it might be restricted to a few actions at the highest and most essential levels of government—actions dealing with matters so vital to the security of the nation that no judicial questioning can be tolerated. Common sense and longstanding precedent[27] indicate that the governing principle in choosing among these extremes, and all the alternatives lying in between, must be a balance of the affected interest in uninhibited government action versus the concern for individual litigant rights.

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[26] We are not unaware that numerous cases in the courts of appeals, many in our own court, have dealt with the problem of official immunity for executive officials. *E.g., Doe v. McMillan*, 459 F.2d 1304 (D.C. Cir. 1972), *aff'd and rev'd in part*, 412 U.S. 306 (1973); *David v. Cohen*, 407 F.2d 1268 (D.C. Cir. 1969); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); *Cooper v. O'Connor*, 99 F.2d 135 (D.C. Cir.), *cert. denied*, 305 U.S. 673 (1938); *Lang v. Wood*, 92 F.2d 211 (D.C. Cir.), *cert. denied*, 302 U.S. 686 (1937); *Smith v. O'Brien*, 88 F.2d 769 (D.C. Cir. 1937); *Standard Nut Margarine Co. v. Mellon*, 72 F.2d 557 (D.C. Cir.), *cert. denied*, 293 U.S. 605 (1934); *Brown v. Rudolph*, 25 F.2d 540 (D.C. Cir.), *cert. denied*, 277 U.S. 605 (1928); *Mellon v. Brewer*, 18 F.2d 168 (D.C. Cir.), *cert. denied*, 275 U.S. 530 (1927). Insofar as these other cases do not comport with the language of more recent Supreme Court decisions, they should be regarded as reversed *sub silentio*.

[27] *See Spalding v. Vilas*, 161 U.S. 483, 498 (1896).

2. *Categorical Prerequisites and the Totality of Circumstances*

In striking this balance in the cases which have come before it, the Supreme Court has made clear that the applicability of absolute as opposed to qualified privilege is contingent on the totality of the circumstances impinging on each case. This is not to say that there are no categorical prerequisites to the applicability of immunity arising from a defendant's employment by the executive branch of government. However, these categorical requirements serve not to distinguish cases of absolute from those of qualified immunity. Rather they single out those cases where no immunity of any kind is justified by the defendant's governmental position.

In defining two categorical prerequisites to the application of any immunity, the Court has made clear, first, that the action sought to be immunized must be within the defendant official's scope of duty.[28] Implicit in this conclusion is the judgment that no proper governmental purpose is served by protecting actions not taken in furtherance of one's employment duties. Second, it is established that immunity extends only to acts of a discretionary as distinguished from a ministerial nature.[29] The guiding thought is that acts required by law and

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[28] In *Barr v. Matteo*, 360 U.S. 564 (1959), where the Court upheld the absolute privilege of the Acting Director of the Office of Rent Stabilization to issue a press release defending the integrity of his agency, the outcome turned in part on the conclusion that the action was taken "within the outer perimeter of petitioner's line of duty". *Id.* at 575.

[29] The decision in *Doe v. McMillan*, 412 U.S. 306 (1973), not to extend immunity to the Public Printer and the Superintendent of Documents rested on the judgment that their activities being challenged in the suit did not involve significant discretion on their part. *Id.* at 322-23. While *Doe* dealt with employees of the Congress, its reasoning concerning discretion is applicable to the executive branch as well. *See Barr v. Matteo*, 360 U.S. 564, 573-74 (1959).

thus lacking a significant discretionary component do not need the protection of immunity, because they will not be inhibited in any event.

Only when it is established that the action is discretionary and within the scope of duty does the question arise as to whether absolute or qualified immunity is applicable. Courts have recognized that the qualified immunity for good faith actions taken on reasonable belief and for a proper purpose[30] is itself a source of substantial protection against inhibition of official action.[31] No doubt partly because the qualified privilege

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[30] The Supreme Court has made clear that the reasonableness of belief and the propriety of the official's purpose which are necessary to make immunity available under the qualified doctrine are variable, depending "upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action . . . ." *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974) (civil rights action against state officials, including Governor). This balancing of all circumstances to determine whether a qualified immunity exists has been well demonstrated in other cases besides *Scheuer*. *See Wood v. Strickland*, 420 U.S. 308, 321-22 (1975) (school officials); *Id.* at 327-31 (Powell, J., dissenting in part); *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (Police Officers); *See also Apton v. Wilson*, 506 F.2d 83, 92 (D.C. Cir. 1974) (High officials of Justice Department, including the Attorney General).

[31] It is noteworthy that a majority of states deem the qualified immunity to be adequate protection against executive timidity in all circumstances, and thus make no provision at all for absolute immunity for any actions by their executive officials. W. PROSSER, THE LAW OF TORTS 989 (4th ed. 1971).

See Scheuer v. Rhodes, 416 U.S. 232, 248 (1974) (quoting Holmes, J., to the effect that, in applying qualified immunity "great weight is to be given to [the defendant's] determination and the matter is to be judged on the facts as they appeared then and not merely in the light of the event." *Moyer v. Peabody*, 212 U.S. 78, 85 (1909)); *Apton v. Wilson*, 506 F.2d 83, 93 (D.C. Cir. 1974); ("The head of an executive

does provide such a significant bulwark against official timidity, the Supreme Court has made clear that the choice between absolute and qualified immunity is to rest on a far-reaching consideration of all factors which may appear relevant. Nowhere in the seminal case of *Barr v. Matteo*,[32] or the subsequent cases bearing on the immunity of members of the executive branch, *Pierson v. Ray*,[33] *Doe v. McMillan*,[34] *Scheuer v. Rhodes*,[35] *Wood v. Strickland*,[36] and *Imbler v. Pachtman*,[37] is there any statement of a categorical rule governing the availability of absolute immunity. While the resulting case-by-case approach may marginally increase an official's uncertainty as to whether the immunity available to him is absolute or qualified, the harmful effect of that uncertainty is greatly mitigated by the blanket of qualified protection pertaining, in any event.[38] A particularistic

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department, no less than the chief executive of a state, is adequately protected by a qualified immunity.") (Leventhal, J.).

[32] 360 U.S. 564 (1959).

[33] 386 U.S. 547 (1967).

[34] 412 U.S. 306 (1973).

[35] 416 U.S. 232 (1974).

[36] 420 U.S. 308 (1975).

[37] 44 U.S.L.W. 4245 (2 Mar. 1976).

[38] A more mechanistic, categorical approach to the application of absolute immunity might eliminate many of the variables affecting the ultimate decision, and in that sense render the choice between absolute and qualified immunity more predictable for the officials most immediately interested. However, we question whether the functional sense of risk at which officials must operate would be significantly reduced at all. For under any reasonable test, absolute immunity would at least depend upon whether the act was discretionary and within the official's scope of duty. Both of these issues contain sufficient imponderables to leave any official, be he

approach to the application of absolute immunity is permissible from a governmental perspective, precisely because a powerful fall-back defense of reasonable, good faith action for a proper purpose is uniformly available.

As the Court first stated in *Barr*, absolute privilege is "an expression of a policy designed to aid in the effective functioning of government." [39] Since then, it has consistently applied a complex, factoring approach, to single out instances where the advancement of government operation by the recognition of absolute immunity outweighs the subordination of litigant rights involved. The mixed outcomes which the Court has reached, as well as the method and language which it has used, make clear that it is proceeding by a case-by-case, functional analysis.

Barr, itself, which upheld the absolute immunity of a sub-agency head in issuing a press release announcing suspension of two employees, clearly exhibits the approach which the Court has subsequently followed. After setting forth in detail the facts of the case, *inter alia*, that defendant's press release came in response to public challenges to the integrity of his performance of duty, the Court concluded that the plea of absolute privilege must be sustained. Noting that the "question is a close one," [40] the Court cited in support of its conclusion the

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lawyer or layman, far less than certain that he would be absolutely protected in most imaginable cases. We believe that such an ostensibly categorical test governing absolute immunity would create almost as much uncertainty of being ultimately held harmless, as does the qualified immunity test of good faith, reasonable action for a proper purpose. Therefore, at the most fundamental level we find unpersuasive the argument that officials will be inhibited if absolute immunity is made contingent on all relevant circumstances.

[39] 360 U.S. at 572-73.

[40] *Id.* at 574.

level of petitioner's office and his powers, the serious and imminent challenge to himself and his agency which provoked his action, and the fact that he was acting within the scope of his duty. The perception of a close question turning on the range of factual circumstances which the Court advanced belies any conclusion that the opinion was stating any sort of an automatic rule for future cases. Rather it was advancing the principle, never set forth before, that absolute immunity *may* extend to the executive officers below cabinet rank where all of the circumstances indicate that it is appropriate.

That the Court was ordering such an *ad hoc* approach is abundantly clear from the cases which it has decided in subsequent years. While several decisions have been made involving asserted immunities of employees of the executive branch, in only one, *Imbler v. Pachtman*,[41] decided this year, has the Court's primary analysis been directed to affirmance of a claim of absolute privilege.[42] That case involved a § 1983 action against a state prosecutor, alleging misfeasance in a previous criminal proceeding leading to deprivations of constitutional rights.

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[41] 44 U.S.L.W. 4245 (2 Mar. 1976).

[42] In *Doe v. McMillan*, 412 U.S. 306 (1973), where the main thrust of the Court's opinion rejected a claim of immunity on behalf of the Public Printer, the Court also elected by footnote to "not disturb the judgment of the Court of Appeals" in finding District of Columbia School officials to be immune from suit. *Id.* at 324 n. 15. While the Court of Appeals appears to have recognized an absolute immunity in the officials, (although the opinion refers only to "official immunity"), 459 F.2d 1304, 1316-18 (D.C. Cir. 1972), the Supreme Court's two sentence footnote gives little indication of its own reasoning in affirming the result. Moreover there appears to be some tension between this summary conclusion and the Court's seeming unanimity in the later case of *Wood v. Strickland*, 420 U.S. 308 (1975), that school officials are generally granted only a qualified immunity. *See infra.*

After noting the prosecutor's integral position in the judicial process and the common law history supporting his absolute immunity,[43] the Court undertook a functional inquiry [44] into the adequacy of qualified privilege in this instance. It concluded, *inter alia*, that the nature of the prosecutor's job in bringing numerous actions, coupled with the delay and inconvenience implicit in dealing with each possible damage action under the qualified privilege, could result in "intolerable burdens." [45] Resting heavily on the uniqueness of the prosecutor's position, the Court noted that it had "no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that face him in the role of an administrator or investigative officer rather than an advocate." [46]

Between *Barr* and *Imbler*, the Supreme Court has decided a number of cases where executive employees raised claims of official immunity, but in every case the Court's primary discussion has led it to a conclusion that only qualified immunity is appropriate.[47] Both the results of these cases and the language and reasoning they employ support reference to the totality of the circumstances to determine whether, in each case, the extra protection of absolute immunity is justified.

In *Pierson v. Ray*,[48] plaintiffs brought a § 1983 action

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[43] 44 U.S.L.W. at 4254-55.

[44] The Court explicitly approved "the Court of Appeals' focus upon the functional nature of the activities rather than respondent's status. . . ." *Id.* at 4256.

[45] *Id.* at 4255.

[46] *Id.* at 4257.

[47] *See* note 42 *supra.*

[48] 386 U.S. 547 (1967). *See Bryan v. Jones*, 44 U.S.L.W. 2521 (5th Cir. 18 May 1976) (en banc) (Extending qualified immunity to jailer, in § 1983 suit).

against police officers [49] who had arrested them for breach of the peace in violation of a Mississippi segregation statute, which was later found unconstitutional. Noting that "[t]he common law has never granted police officers an absolute and unqualified immunity" [50] but has conferred qualified immunity for actions in good faith and with probable cause, the Court found that common law immunity to be applicable here and remanded to the district court to determine whether the prerequisites of qualified immunity were met. The Court indicated the functional justification for the immunity by referring to the state of affairs which would prevail without it: "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." [51] At the same time, the reason for the good faith qualification is apparent. It arises from the officer's unique position in society, charged with the power and duty immediately to curtail liberties on a day-to-day basis.

Higher echelon executive officials were found entitled to only qualified immunity in *Scheuer v. Rhodes*,[52] an-

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[49] The action was also brought against the local judge who presided at the trial in which convictions under the unconstitutional statute were obtained. The Court found applicable the absolute immunity traditionally accorded judges, and therefore affirmed dismissal of that action. *Id.* at 553.

[50] *Id.* at 555.

[51] *Id.*

[52] 416 U.S. 232 (1974).

Our own court, speaking through Judge Leventhal, has rejected claims of absolute immunity made on behalf of the Attorney General of the United States, in the context of an action for denial of constitutional rights. *Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974). In that opinion, Judge Leventhal pursued the type of analysis that we believe is appropriate

other § 1983 action, brought this time against the Governor and other Ohio state officials. That case came to the Supreme Court upon a decision by the court of appeals that defendants' conduct surrounding National Guard action against demonstrators at Kent State University were protected by a doctrine of absolute "executive immunity." [53] The Court set for itself the narrow task of determining the applicability of absolute immunity on the facts before it,[54] and made clear that its decision rested on a balance of the need for the immunity versus the importance of the litigant interests being pursued.[55]

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in all cases where a choice must be made between qualified and absolute immunity. After reviewing the common law of official immunity, he considered the specific litigant's interests at stake as weighed against the asserted need for absolute immunity. Concluding that the "head of an executive department no less than the chief executive of a state, is adequately protected by a qualified immunity, and giving heavy weight to the individual litigants' rights at stake, *id.* at 93, the court remanded for determination whether the acts at issue were shielded by the qualified immunity which it found applicable.

Other courts have found qualified immunity applicable in suits against federal agency officials. *Economou v. Department of Agriculture*, 44 U.S.L.W. 2516 (2d Cir. 11 May 1976) (§ 1983 action against Dept. of Agriculture officials); *Mark v. Groff*, 521 F.2d 1376 (9th Cir. 1975) (Constitutional action against I.R.S. officials).

[53] 416 U.S. at 238.

[54] *Id.* at 242.

[55] Final resolution of this question must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government, as well as the purposes of 42 U.S.C. § 1983.

Id. at 243. Noting first the historical importance of the cause of action created by § 1983, the Court also pointed out that the statute had never been read as a wholesale abolition of existing personal immunities. Citing the instances of *Tenney v. Brandhove*, 341 U.S. 367 (1951) and *Pierson v. Ray*, 386

After weighing both sides of the argument, the Court concluded:[56]

U.S. 547 (1967), where pre-existing immunities were found applicable in the § 1983 context, the Court proceeded to evaluate the functional need for immunity in their case, as compared with the need recognized in *Pierson*:

> When a court evaluates police conduct relating to an arrest its guideline is "good faith and probable cause." In the case of higher officers of the executive branch, however, the inquiry is far more complex since the range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions—is virtually infinite. In common with police officers, however, officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office. Like legislators and judges, these officers are entitled to rely on traditional sources for the factual information on which they decide and act. When a condition of civil disorder in fact exists, there is obvious need for prompt action, and decisions must be made in reliance on factual information supplied by others. While both federal and state laws plainly contemplate the use of force when the necessity arises, the decision to invoke military power has traditionally been viewed with suspicion and skepticism since it often involves the temporary suspension of some of our most cherished rights—government by elected civilian leaders, freedom of expression, of assembly, and of association. Decisions in such situations are more likely than not to arise in an atmosphere of confusion, ambiguity, and swiftly moving events and when, by the very existence of some degree of civil disorder, there is often no concensus as to the appropriate remedy. In short, since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad.

Id. at 245-47. (citation omitted).

[56] *Id.* at 247.

> These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.

Subsequent to *Scheuer*, the Supreme Court has decided a third case wherein it found qualified immunity applicable to employees of the executive branch of government. In *Wood v. Strickland*,[57] a § 1983 action was brought against state school administrators for expulsion of students for alleged violation of regulations prohibiting possession of intoxicating beverages at school. While the Court split 5-4 on the precise standard to be applied in evaluating defendant's good faith, the Justices were all agreed that only a qualified immunity was available to the school officials. After noting the common law tradition in support of such a qualified immunity, the Court again applied the sort of functional, balancing approach evidenced in all its previous decisions. It recognized that school officials "function at different times in the nature of legislators and adjudicators . . ." in the formulation of long term policy and in the authorization of prompt action, often on the basis of second hand information. The conferral of no immunity in such a situation "would unfairly impose upon the school decision-

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[57] 420 U.S. 308 (1975).

Subsequently, in *O'Connor v. Donaldson*, 422 U.S. 563, 576-77 (1975), the Court affirmed in principle a lower court conclusion that the Superintendent of a State Mental Hospital was entitled to qualified immunity in a § 1983 action by a patient. While the Court did not question the conclusion that the qualified rather than the absolute doctrine was applicable, it remanded for redetermination of defendant's good faith, in light of the standard set forth in *Wood v. Strickland*.

maker the burden of mistakes made in good faith . . ." and contribute to "intimidation." [58]

> But at the same time, the judgment implicit in this common-law development is that absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." [59]

In our view these recent decisions by the Supreme Court clearly foreclose any conclusion on our part that there is an absolute immunity for executive officials which is to be mechanistically applied to discretionary actions within the scope of duty. While a bright-line rule is to to be preferred where circumstances permit, the cases make completely clear that no such rule is possible here, and no effort to distinguish the cases can demonstrate otherwise.

3. *No § 1983 Distinction*

An argument can be made that the cases finding qualified immunity are somehow inapposite to the case at bar, in that all were § 1983 actions, suing for infringement of federal rights. However, while the nature of the litigant interest potentially to be foreclosed by the immunity clearly should be weighed in the balance determining whether absolute or qualified immunity is applicable,[60] there is no reason to believe that the fact of a § 1983 action changes the method of determination from a mechanistic rule to a balancing process.

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[58] 420 U.S. at 319.

[59] *Id.* at 320.

[60] *See* cases in Supreme Court, discussed *supra*, and *Jaffe, Suits Against Governments and Officers:—Damage Actions*, 77 Harv.L.Rev. 209, 225-39 (1963).

There is no logical reason that a qualitatively different approach should apply in § 1983 cases, thus rendering the reasoning of those cases inapposite to non-§ 1983 actions. Further, in the recent *Imbler* case, which upheld a claim of absolute immunity in a § 1983 action, the Supreme Court reinforced the implication of its previous decisions, "that § 1983 is to be read in harmony with general principles of tort immunity and defenses rather than in derogation of them." [61] While § 1983 may affect the type of immunity to be applied, it does not alter the balancing process by which that conclusion is ultimately reached.

4. *Standards for the District Court in this Case*

The question is thus presented as to what, concretely, the district court should properly consider in deciding whether the absolute or the qualified doctrine is to be applied. In general, the balancing process should weigh the added benefits resulting from the increased level of protection, against the litigant rights accordingly lost. More specifically, a number of factors meriting attention can be singled out.[62]

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[61] 44 U.S.L.W. at 4253.

In support of this conclusion the Court made reference to its earlier decisions in *Tenney v. Brandhove*, 341 U.S. 367 (1951) and *Pierson v. Ray*, 386 U.S. 547 (1967), which affirmed the continuing applicability of certain common law immunities in § 1983 actions. 44 U.S.L.W. at 4253.

[62] As noted above, the essential prerequisite for any immunity to apply, on account of one's connection to the executive branch, is a discretionary action within the scope of employment duty. It may also be possible for an official to invoke a qualified privilege from defamation action for statements outside the scope of his duties, where they satisfy the common law prerequisites for private persons, of good faith, reasonable action for a proper purpose. W. PROSSER, THE LAW OF TORTS 785-96 (4th ed. 1971).

On the one hand, the cases make clear that the nature of the interest being sued upon should receive significant consideration. In the Supreme Court's § 1983 decisions, involving important federal rights, this has been especially apparent.[63] While the litigant interest in this case does not, perhaps, rise to that level of urgency, the Supreme Court has given great weight to the interest in personal reputation, in determining due process requirements for governmental action.[64] We conclude that in the context of a libel action, the interest in reputation is likewise to be weighed heavily, and only to be subordinated to the flat bar of absolute immunity where there is reason to believe that such subordination will have an important effect on governmental functioning.

The governmental interest to be weighed against the litigant's concern to pursue his action has two basic aspects. First, the court must inquire as to how much of a difference the application of absolute as opposed to qualified immunity is likely to make in the official's performance of his duties, whatever they may be. In some contexts, such as that of the prosecutor in *Imbler*, the difference in functional protection is obvious and striking—without such an absolute immunity, a prosecutor might be paralyzed by the potential suits which numerous former defendants might file.

In other instances, the absolute protection may be of great importance not because many suits are likely, but because the extra immunity may be instrumental in leading the official to take difficult action which is vitally important to the overall performance of statutory duties. This, it seems to us, is the case in *Barr*, where a unique

[63] *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 243-45 (1974).

[64] *Board of Regents v. Roth*, 408 U.S. 564, 567 (1972) (dictum); *Wisconsin v. Constantineau*, 400 U.S. 433, 436-37 (1971).

chain of events had "directly and severely challenged" the integrity both of the defendant and of the internal operations of the agency which he headed, which made essential some action in the nature of that which was taken. The essential character of that single action to all future operations of the agency was found to justify absolute immunity, as a means of eliminating any significant risk that fear would be an immobilizing force.

To determine what contribution absolute immunity would make to Dr. Evans' performance of his duties, the district court must therefore go beyond consideration of whether he was acting in the scope of his duties, to ask how often and how importantly the threat of suit might effect the performance of duty. If, as seems unlikely, the rendering of such opinions as that at issue here is a frequent aspect of Dr. Evans' job, the analogy to *Imbler* becomes striking; the possibility of numerous, burdensome suits in which reasonable, good faith belief must always be proven would be a very important concern. If the rendering of such opinions is deemed vitally important, or there appears strong reason to believe that his opinions would be more freely given under an absolute than a qualified immunity, these factors would also weigh in favor of a determination of absolute immunity. In sum, the court must ask what practical difference absolute immunity would make in the performance of duty, over the qualified protection otherwise pertaining.

The second aspect of the functional governmental interest weighing against the affected litigant rights, is the governmental character of the duties of the official being protected. We believe that the absolute character of the immunities recognized to protect legislators[65] and

[65] 360 U.S. at 574.

[66] The relationship between absolute immunity and the full and proper performance of legislative duties has been well

judges [67] is in part traceable to the perception that they are charged with a public trust which can only be fulfilled in an atmosphere of completely uninhibited discourse. Insofar as an executive official's duties can similarly be characterized as involving a vital public trust, the argument for absolute protection is strengthened.

I do not, of course, mean to imply that this is an area in which clear lines can be drawn, or that there should be no absolute immunity for activities falling outside of some central core of functions that can be

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recognized in Britain for several centuries, and received substantial attention from the founding fathers in light of infringement on the principle which preceded our revolution. As one of them expressed the thought:

> In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.

II *Works of James Wilson* 38 (Andrews ed. 1896), as quoted in *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951).

[67] The absolute immunity of judges likewise can be traced far back into English common law, and rests upon the essential function of judges in preserving public order. As Mr. Justice Field stated in *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 536 (1869):

> This doctrine is as old as the law, and its maintenance is essential to the impartial administration of justice. Any other doctrine would necessarily lead to the degradation of judicial authority and the destruction of its usefulness. Unless judges, in administering justice, are uninfluenced by considerations personal to themselves, they can afford little protection to the citizen in his person or his property. . . .
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> This exemption from civil action is for the sake of the public and not merely for the protection of the judge.

qualitatively distinguished as "governmental." All will agree that government has expanded far beyond any such idealized conception which we might like to establish, and has done so in a manner as to render futile any such effort at qualitative dichotomy. In a sense there is a public trust created in any official, regardless of duties, who is on a governmental payroll.

However, in this era of government grown far beyond any limits envisioned even at the beginning of this century, the Supreme Court's functional approach to immunity doctrine makes it entirely appropriate to recognize that many of the areas government has entered involve operations nearly indistinguishable from private endeavors, having only the most marginal effect on matters usually identified with the public sector. Insofar as that is true, our awareness that the parallel private entities have, at most, a qualified privilege for reasonable, good faith conduct, should color our perception of the immunity functionally justified for the governmental official. In the context of the comprehensive balance to be struck, this question of public versus private character is not solely determinative, but seems properly a factor to be weighed along with others. In the case of Dr. Evans' at the Smithsonian, we leave to district court assessment the degree to which his argument for absolute immunity is functionally buttressed by his governmental association.

To summarize, we conclude that absolute immunity should be granted an executive official only where these conditions are met: First, the action at issue must be discretionary and within the scope of employment duties. Second, the court must further find that the extra contribution of absolute immunity to the "effective functioning of government" [68] justifies the concommitant denial of litigant interests, in view of the part played by the challenged activity in defendant's overall performance of duties, and in view of the functions which that

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[68] 360 U.S. at 573.

official performs, within a traditional conceptual framework of public and private sectors.

B. *Qualified Immunity*

If the district court concludes that absolute immunity is inapplicable on the facts of this case, it must then go on to assess whether Dr. Evans is nonetheless protected under a doctrine of qualified immunity for good faith, reasonable action. For the particulars of the application of that doctrine, resting on executive employment, we must defer to the language of the Supreme Court in those cases where it has been found applicable.[69] As to the possible relevance of a residual qualified privilege for private persons, arising out of a non-governmental interest or duty, we have nothing to add to the ample cases and commentaries.[70] We note only that the qualified privilege or immunity based on either theory is not a blanket protection for good faith action, but also has an objective component.[71] While the action at issue must be taken in good faith belief in its correctness, that does not suffice. Any mistake on the part of the defendant must be objectively reasonable, in view of the pressures and duties under which he was operating, and in light of the personal interests foreseeably in jeopardy at the time the action was taken.

The decision of the district court is REVERSED in part, and the case is REMANDED for further proceedings consistent with this opinion.

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[69] *See O'Connor v. Donaldson*, 422 U.S. 563, 576-77 (1975); *Wood v. Strickland*, 420 U.S. 308, 318-22 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 247-49 (1974); *Pierson v. Ray*, 386 U.S. 547, 557-58 (1967).

[70] *See, e.g.*, I F. HARPER & F. JAMES, THE LAW OF TORTS 441-56 (1956); W. PROSSER, THE LAW OF TORTS 785-96 (4th ed. 1971).

[71] *Wood v. Strickland*, 420 U.S. at 321; *Scheuer v. Rhodes*, 416 U.S. at 247-48.

LEVENTHAL, *Circuit Judge*: I concur in Part I of the majority opinion dismissing plaintiff's suit against the Smithsonian Institution. I dissent from a portion of Part II, concerning the suit brought against defendant Evans in his individual capacity. This is an action brought by a corporation which says its property interests were impaired when defendant Evans, an official of the Smithsonian, referred to it it disparaging terms when he answered an inquiry. If his answer was a purely personal action—outside the scope of his duty—then he is fully suable. If however he was acting within the ambit of his discretion, then under the principle of *Barr v. Matteo*[1] he is an executive officer who must be accorded full immunity from suit, and this immunity cannot be undermined by a claim that his action was rooted in personal malice.

In disregarding the principle set forth in *Barr v. Matteo*, *supra* and precedents of this court applying it,[2] today's majority decision goes astray, in my view. It presumes, presumptuously I think, that *Barr* has been *sub silentio* overruled, or confined to its specific facts—which was the formula in vogue in England for disregarding precedents of the House of Lords when they could not in theory be overruled. The majority does have the support of the Second Circuit's ruling in *Economou v. U.S. Department of Agriculture*, —— F.2d ——, 44 L.W. 2516 (April 23, 1976), but if anything *Economou* highlights the perils of seeking to define a single immunity standard applicable to all executive officials without

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[1] 360 U.S. 564 (1959) (plurality); *see also* Howard v. Lyons, 360 U.S. 593 (1959).

[2] *See, e.g.*, Doe v. McMillan, 148 U.S.App.D.C. 280, 293, 459 F.2d 1304, 1317 (1972), *affirmed in part*, 412 U.S. 306 (1973); David v. Cohen, 132 U.S.App.D.C. 333, 337, 407 F.2d 1268, 1272 (1969).

distinguishing between the actions involving constitutional violation and those involving solely common law torts. Putting aside overriding constitutional dimensions, the problem is the chilling effect on federal officials pursuing their duties from a doctrine that renders them suable by persons claiming disparagment. This is what *Barr* sought to avoid, and it is not faced by today's majority.

Economou rejected *Barr*, and held that only a qualified "good faith" immunity rule was applicable to Agriculture officials who were sued for $32 million in damages by a plaintiff charging defamation and wrongful institution of administrative proceedings. Judge Mansfield's opinion discloses that what was involved was an administrative complaint, and accompanying press release, that alleged, on the basis of an audit, that Economou had failed to maintain the minimum prescribed capital balance required for a registered futures commission merchant. Economou's action was filed after an administrative law judge had issued a decision finding a violation, but while the administrative proceeding was still pending on appeal.

Administrative actions to assure compliance with regulations are essential to modern government. Suability for such actions will encourage officials to avoid taking them whenever the person involved is considered to have resources or disposition to defend with all affirmative tactics. When millions of dollars turn on such regulatory decisions, there is a strong incentive to pursue any remedy that promises some possibility of relief. Economou's action illuminates the danger. The prospect of savage retaliation is not a mere flight of fancy. In the not too distant past, the affected manufacturer launched an attack aimed at the removal of someone as objective and prestigious as a Bureau of Standards head, for the Bureau's conclusion that a battery additive did not test up

to its claims. The risk of court actions and of the need to find time and money for a defense[3] against potentially catastrophic financial liability, would have a chilling, if not paralyzing, effect on an official's inclination to exercise his discretion in accordance with the public interest when a claim of unjustified disparagement of business reputation can be made a sword.

As the *Economou* court recognized, if *Barr* had governed its decision, its inquiry would have stopped if "the alleged conduct of the defendants in the present case was 'within the outer perimeter of their authority' and involved the exercise of discretion."[4] Absolute immunity would have been properly invoked, and the case dismissed. Instead the court denied *Barr* precedential effect and sought to follow subsequent § 1983 cases—*e.g.*, *Pierson*,

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[3] Although government counsel now often defend even personal actions against federal officers arising out of their official duties, they are not required to do so. *See, e.g.*, 28 U.S.C. § 517 (1970):

> The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

[4] Slip op. at 3399. In the case before us, the trial judge did not adequately explore this issue below. Although Evans' responsibilities included responding to information inquiries from foreign governments in his field, the record does not elucidate whether official replies had to be channelled in a certain manner; whether Smithsonian officials respond to personal inquiries in their official capacity, and if the letter was a personal letter whether it is considered proper for several officials to comment independently on foreign queries. These considerations are relevant to the determination of whether Evans acted within the perimeter of his responsibilities or whether, as plaintiff claims, he was acting in a personal capacity.

Scheuer, Wood [5]—applying common law rules of qualified immunity.

In seeking to "neaten up" this corner of the law, neither *Economou* nor the majority today recognizes that the very "common law" they so eagerly invoke for an across-the-board qualified immunity rule also lacked a consistent immunity standard. Absolute immunity has historically been recognized and protected for judges,[6] legislators,[7] and people very close to their protected sphere of action like prosecutors.[8] In the context of vindicating constitutional rights violated by state officials, the Supreme Court has looked to state common law rules for the qualified immunity doctrine governing the executive branch exercising executive functions. But when the Supreme Court evaluated the *federal* common law rule governing officials charged with damaging reputations during their performance of discretionary duties, the

[5] Pierson v. Ray, 386 U.S. 547 (1967); Scheuer v. Rhodes, 416 U.S. 232 (1974); Wood v. Strickland, 420 U.S. 308 (1975). *See also* O'Connor v. Donaldson, 422 U.S. 563 (1975); Apton v. Wilson, 165 U.S.App.D.C. 22, 506 F.2d 83 (1974); Mark v. Groff, 521 F.2d 1376 (9th Cir. 1975).

[6] *See, e.g.*, Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872); Pierson v. Ray, 386 U.S. 547, 554-55 (1967).

[7] Tenney v. Brandhove, 341 U.S. 367 (1951); Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972); Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966).

[8] Imbler v. Pachtman, 96 S.Ct. 984, 995 (1976). The Court specifically refused to consider whether the immunity granted to prosecutors acting as officers of the court would extend to "those aspects of the prosecutor's responsibility that cast him in the role of administrator or investigative officer." In Apton v. Wilson, 165 U.S.App.D.C. 22, 506 F.2d 83 (1974), this court extended Scheuer v. Rhodes to an action alleging infringement of Fourth and Fifth Amendment rights by officials of the Justice Department considered to be acting outside the judicial umbrella.

Court weighed the interests on both sides and decided that absolute immunity should be the standard: [9]

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. The matter has been admirably expressed by Judge Learned Hand:
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> > . . . The justification for [denying recovery] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith . . . Gregoire v. Biddle, 177 F.2d 579, 581.

In appraising whether official duties are discretionary [10] so as to invoke this absolute immunity doctrine,

[9] 360 U.S. at 571.

[10] This court has previously indicated how to carry out analysis of whether a duty is discretionary: "The test of whether a challenged action is ministerial or non-ministerial is not the office *per se* or its height, but whether the function itself was of such discretionary nature that the threat of litigation would impede the official to whom it was assigned." David v. Cohen, 132 U.S.App.D.C. 333, 337, 407 F.2d 1268, 1272 (1969). The court also stated that the position of an official in the executive hierarchy is not determinative of the

the *Barr* Court considered whether the officer, whatever his rank, must possess the discretion if the public service is to function effectively. 360 U.S. at 575. If the official has a duty that encompasses the sound exercise of discretionary authority, then it suffices to establish absolute immunity that the action taken was "within the outer perimeter of [his] line of duty," and the court must disregard even an allegation of malice. Malice may of course mean injustice, and it would defeat the qualified immunity available to private persons at common law. In the overall balance, however, Justice Harlan concluded in *Barr* that any instance of actual injustice is the price paid for the greater public good, of avoiding undue restriction of the discretion of an official to speak out in the course of his duty. 360 U.S. at 575.

Both *Barr* and this case involve an action for defamation. At stake here is damage to business reputation—an interest of no greater weight than the interest in personal reputation involved in *Barr*. Damage to reputation is not inconsequential,[11] and Congress might have

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discretionary-nondiscretionary evaluation: "Thus, while the the actions of a low-ranking administrative official are more likely to be ministerial, the privilege has been extended to administrative as well as judicial officials and to personnel whose position is low as well as to those whose rank is high." *Ibid.*

See also Doe v. McMillan, where this court held that the D.C. defendants were immune on a determination that (1) the individual was performing acts within the scope of his official duties, and (2) the action undertaken required the exercise of his discretion. Doe v. McMillan, 148 U.S.App.D.C. 280, 293, 459 F.2d 1304, 1317 (1972). The Supreme Court affirmed, stating (412 U.S. at 324): "With respect to the District of Columbia respondents, the Court of Appeals found that they were acting within the scope of their authority under applicable law and, as a result, were immune from suit. We do not disturb the judgment of the Court of Appeals in this respect."

[11] The interest in personal reputation can qualify for due process protection. *See* Board of Regents v. Roth, 408 U.S. 564 (1972); Wisconsin v. Constantineau, 400 U.S. 433 (1971). *But see* Paul v. Davis, 96 S.Ct. 1155 (1976).

done better not to exempt the tort of defamation from the Tort Claims Act. But when it comes to holding an individual official rather than the government liable for damages to reputation, the doctrine established in *Barr* intercedes, unless and until the Supreme Court or Congress overrules it.

The Supreme Court decisions in § 1983 cases do not overrule *Barr*. They rather establish the rule for cases where fundamental, constitutional rights are involved, and declare that ordinary rules of official immunity must yield when the executive is charged not merely with abuse of discretion but with exercising his special power as a government official in a way prohibited by the Constitution. In *Scheuer v. Rhodes*,[12] Chief Justice Burger did not jettison *Barr*—he rather cited it and its antecedent, *Spalding v. Vilas*, 161 U.S. 483 (1896),[13] as cases illuminating the inherent necessity of providing broad protection to executive discretionary acts in the context of defamation actions. He noted, however, that *Barr* and *Spalding* arose "in a context other than a § 1983 suit" (at 247), and did not extend the absolute immunity those cases granted to federal executive officials, holding that state officials sued under § 1983 could only claim qualified immunity. Chief Justice Burger's opinion makes the reason clear: Since § 1983 gives an action against state officials when constitutional violations were invoked, it is patently inconsistent with that statutory action to

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[12] 416 U.S. 232 (1974).

[13] *Spalding* held that the head of an executive department has absolute immunity for special communications made by him pursuant to an act of Congress for matters within his authority.

recognize an absolute immunity for all officials subject to suit under its provisions.[14]

The doctrine of qualified immunity developed for state executive officials sued under § 1983 [15] is manifestly sound. Similarly sound was this court's extension of the

[14] Final resolution of [the scope of qualified immunity] must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government, as well as the purposes of 42 U.S.C. § 1983. In neither of these inquiries do we write on a clean slate. It can hardly be argued, at this late date, that under no circumstances can the officers of state government be subject to liability under this statute. In *Monroe* v. *Pape*, . . . Mr. Justice Douglas, writing for the Court, held that the section in question was meant "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position.". . Through the Civil Rights statutes, Congress intended "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."

Since the statute relied on thus included within its scope the "'[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law,'" *id.*, at 184 (quoting *United States* v. *Classic*, 313 U.S. 299, 326 (1941)), government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms. Indeed, as the Court also indicated in *Monroe* v. *Pape*, *supra*, the legislative history indicates that there is no absolute immunity

Scheuer v. Rhodes, 416 U.S. 232, 243 (1974).

Cf. Imbler v. Pachtman, 96 S.Ct. 984 (1976) and Pierson v. Ray, 386 U.S. 547 (1967), where it was nevertheless recognized that *some* state officials—prosecutors and judges—could be held absolutely immune under § 1983 so long as they were exercising judicial or quasi-judicial powers.

[15] See cases cited at note 5, *infra*.

principle of *Scheuer* v. *Rhodes* to a case not strictly within § 1983—because it involved officials of the Federal Government (Justice Department) and of the District of Columbia—but similar in the respect that plaintiffs were claiming violation of constitutional rights. *Apton* v. *Wilson*, 165 U.S.App.D.C. 22, 506 F.2d 83 (1974). At the risk of immodesty—for I am quoting myself, yet take comfort from the fact that Judge Wilkey concurred in the opinion—the opinion pointed out that Apton's case involved Fourth and Fifth Amendment rights and continued: "The individual rights at stake here are of the same magnitude as those asserted in *Scheuer*. Freedom from arbitrary arrest and detention are among our most cherished liberties." [16] The *Apton* opinion discussed *Barr* and *Spalding* and brought out that they "focused on the particular injuries alleged there—loss of contract in *Spalding* and injury to reputation in *Barr*." [17] It stated that the soundness of any extension of *Barr* must be appraised in the light of *Scheuer*, and concluded that an extension of *Barr* to the area of constitutional injuries would not be justified or consistent with the principle underlying *Scheuer*. Today, however, the court errs, I submit, when it holds that *Barr* may be set to one side, even in a case that is not underpinned by a substantial claim of infringement of constitutional rights.[18]

Only three years ago, the Supreme Court rapped the knuckles of a distinguished federal judge who had con-

[16] 165 U.S.App.D.C. at 32, 506 F.2d at 93.

[17] 165 U.S.App.D.C. at 30, 506 F.2d at 91.

[18] A similar analysis of the distinction drawn in the cases between constitutional and common law torts can be found in a recently published comment. *See Note, Damages for Federal Employment Discrimination: Section 1981 and Qualified Executive Immunity*, 85 YALE L.J. 518, 528. *See also* States Marine Lines, Inc. v. Schultz, 498 F.2d 1146, 1159 (4th Cir. 1974).

cluded that the rationale of a Supreme Court decision had been substantially undermined by a later Supreme Court decision. *United States v. Mason*, 412 U.S. 391 (1973). The Court commented (412 U.S. at 395): "It must be noted, however, that the *Squire* court did not purport to question or overrule *West*, and. indeed, did not so much as mention that decision." The same must be said for *Barr*. As for Judge Mansfield's opinion in *Economou*, apart from one's "difficulty in comprehending how decisions by lower courts can ever undermine the authority of a decision of this [Supreme] Court" (see 412 U.S. at 396), I think today's majority would be better advised to follow Judge Mansfield's course earlier this year, when he applied Judge Friendly's sage advice: "[W]e continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions," *see United States v. Karathanos*, 44 U.S.L.W. 2406 (2d Cir., Feb. 2, 1976), *quoting Salerno v. American League of Prof. Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970), *cert. den.*, 400 U.S. 1001 (1971). Of course, every rule is subject to limits, and there may be occasions when a judge can say that he cannot consistently with the demands of conscience of a constitutional judge adhere to an old decision and reach results inconsistent with later Supreme Court rulings. But that is hardly the case today when the intervening Supreme Court rulings can be distinguished as involving constitutional claims—a point that can hardly be deemed inconsequential. and one that was. indeed. identified by the Chief Justice in *Scheuer* (*see* 416 U.S. at 243).

Today the majority says that *Barr* must be read restrictively, and that its application to different fact situations requires a new balancing test *ab initio*. The § 1983 cases they rely on however, seem, by contrast, to provide definitive rulings as to immunity for specific

executive and judicial functions.[19] Even reading *Barr* narrowly, without extension, it should at least be taken to have established a federal common law rule that for suits involving defamation by executive officials, absolute immunity can be invoked as a defense.[20] That absolute immunity is not spoken to in *Imbler*, *supra*—which was concerned with the different rule of absolute immunity for the judicial process (and held that it was so firmly settled that it applied to actions under § 1983). With all respect, I think today's majority and *Economou* off the point both in their reliance on *Imbler*,[21] and also in *Economou's* reference to cases involving state (not federal) common law applicable to state executive officials.[22]

Unless and until the Supreme Court says so, I do not think *Barr v. Matteo* is to be confined to its particular

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[19] *See, e.g., Pierson, infra*, (unconstitutional arrests by police officers); *Imbler, infra* (prosecutorial, quasi-judicial acts).

[20] As to a cause of action for defamation, Paul v. David, 96 S.Ct. 1155 (1976) apparently precludes a § 1983 suit.

[21] *Economou's* reliance on *Imbler* is particularly curious in light of Judge Mansfield's reliance on Justice White's concurrence in that case, 96 S.Ct. at 996-7, reasoning that "since the effect of a grant of immunity is to 'negate pro tanto the very remedy which Congress sought to create [by enactment of 42 U.S.C. § 1983] . . . the Court has not extended *absolute* immunity to such officials in the absence of a showing that the immunity is necessary.'" Slip op. at 3406. The fair import of this statement by Justice White, like the similar statement by Chief Justice Burger in *Scheuer*, is that Congressional enactment of § 1983 makes impossible an automatic extension of the absolute immunity otherwise applicable to high executive officers.

[22] Confusing the separate lines of tort immunity developed for executive officials in state and federal courts seems to stem from the problems of federalism raised by § 1983's provision of a federal remedy against state officials, and the necessity of reconciling state immunity rules for state officials with federal statutory liability policies.

facts—in plain English is to be taken as a ruling without precedential force. Rejecting the doctrine of *Barr* for a "particularistic" [23] inquiry into liability would not merely trammel the ruling but jettison its purpose, for it would insert the chill that *Barr* sought to avoid.

While I do not propose to become involved in the particularistic weighting program launched by the majority, its inquiry might have benefited from discussion by the parties, whose attention was not focused on this issue. Indeed, the almost casual attitude of government counsel to this issue of personal liability is not without its overtones, though I can hardly condemn them for relying on *Barr* as a clear precedent directly in point. And while courts do have a license of sorts to expatiate at large, I am much concerned with the passage in today's majority opinion that contemplates a return to the discredited governmental-proprietary distinction, in a particularly unlikely context. *See Parker v. Brown*, 317 U.S. 341 (1943); *Spencer v. General Hospital of D.C.*, 138 U.S. App.D.C. 48, 425 F.2d 479 (1969), followed in *Wade v. District of Columbia*, 310 A.2d 857 (D.C.C.A. 1973). A large number of government departments, maybe most, conduct activities that have some private counterpart—weather and crop reports; inspection of ships, and trucks for safety; testing materials; delivery of packages and even mail, etc. If the governmental officials are performing discretionary functions, they should have the same immunity, or privilege to comment and question, without regard to whether the functions are of such a nature that they can be performed by private agencies. If private individuals run an economic risk when they volunteer a comment they at least have the general prospect of gain from private economic enterprise. There is no comparable private profit pulling on government officials acting within the perimeter of their discretionary duties.

[23] *See* majority opinion at 16.

In sum, both *Economou* and today's majority undercut *Barr* by allowing federal officials to be subject to substantial involvement in a lawsuit whenever an individual or company experiences harm to reputation as a result of actions taken pursuant to regulatory authority.[24] Such officials get legal representation by the government only at the discretion of the Attorney General; [25] even passing the monetary costs, involvement in protracted litigation, unpredictably governed by an ad hoc balancing test, is costly in time and anxiety. Overruling *Barr* can only exacerbate a serious problem of government—the tendency of bureaucrats to sit tight rather than take action likely to rile the individuals or groups being regulated. For every case of malicious governmental action potentially remedied under such a rule, hundreds if not thousands of other actions in the public interest may be deferred or omitted. There is too much to be said for the *Barr* choice, there was too much hard work and hard thought when the problem was faced squarely by great judges like John Harlan and Learned Hand, to sweep it aside as the detritus of a doctrine that has been nibbled away *sub silentio*.

[24] *Economou* adopted an immunity rule applicable to the actions for both defamation and wrongful institution of administrative proceedings.

[25] *See* note 3, *infra*.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EXPEDITIONS UNLIMITED AQUATIC ENTERPRISES, INC., *ET AL.*,
Plaintiffs,
v.
SMITHSONIAN INSTITUTION, *ET AL.*,
Defendants.

Civil Action No. 54-71

FILED
July 3, 1974
JAMES F. DAVEY, Clerk

ORDER

Upon consideration of the plaintiffs' motion to vacate this Court's previous Order of December 19, 1972 denying plaintiffs' motion to vacate and re-enter this Court's judgment of January 17, 1972 in favor of defendants; and now to vacate and re-enter said judgment of January 17, 1972 in favor of defendants as of the current date; and the points and authorities attached thereto, it is by the Court this 31st day of July, 1974.

ORDERED, that this Court's previous Order of December 19, 1972 denying plaintiffs' motion to vacate and re-enter this Court's judgment of January 17, 1972 in favor of defendants, be, and it is hereby vacated, and be it

FURTHER ORDERED, that this Court's judgment of January 17, 1972 in favor of defendants, be, and it is hereby vacated, and re-entered as of this date, the 31st day of July, 1974.

/s/ Joseph Waddy
JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EXPEDITIONS UNLIMITED AQUATIC ENTERPRISES, INC., *et al.*,
Plaintiffs,
v.
SMITHSONIAN INSTITUTION, *et al.*,
Defendants.

* * *

Civil Action No. 54-71

ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS

Upon consideration of the pleadings and of defendants' motion to dismiss the complaint herein, or, in the alternative, for summary judgment, the affidavits, exhibits and points and authorities in support thereof, and of plaintiffs' opposition to said motion and defendants' reply to said opposition, and the Court concluding therefrom that the defendant, Smithsonian Institution, is an establishment of the United States and a "Federal Agency" within the meaning of the Federal Tort Claims Act, 28 U.S.C. §2671, et seq., which by Section 2680 was expressly excepted from being sued for libel, and that the United States has not elsewhere authorized the maintenance of such suit against it, and the Court further concluding that the act of the defendant, Evans, was within the outer perimeter of his Federal employment, and that there is no genuine issue of material fact and defendants are entitled to judgment as a matter of law, it is by the Court this 17th day of January, 1972,

ORDERED, that the motion of the defendants for summary judgment be and the same is granted and that summary judgment is hereby granted in their behalf.

/s/ Joseph Waddy
JUDGE